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IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF YAVAPAI

JOHN B. CUNDIFF and **BARBARA C. CUNDIFF**, husband and wife; **BECKY NASH**, a married woman dealing with her separate property; **KENNETH PAGE** and **KATHRYN PAGE**, as Trustee of the Kenneth Page and Catherine Page Trust,

Plaintiffs,

vs.

DONALD COX and **CATHERINE COX**, husband and wife,

Defendants.

Case No. [redacted]

Division 1

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: DEFENDANTS' VIOLATIONS OF RESTRICTIVE COVENANTS; AFFIRMATIVE DEFENSES OF ESTOPPEL, LACHES AND UNCLEAN HANDS

(Oral Argument Requested)

Plaintiffs, by and through undersigned counsel, hereby move for summary judgment on Defendants' affirmative defenses of estoppel and unclean hands against Plaintiffs action for enforcement of the restrictive covenants, particularly the prohibition against business and commercial enterprises, contained in the Declaration of Restrictions governing Coyote Springs Ranch.

This motion presents a pure question of law, and therefore, is appropriate for summary judgment. This motion is supported by the following memorandum of points and authorities, separate statement of facts with attached exhibits filed contemporaneously herein, as well as the entire record in this proceeding. This motion, together with Plaintiffs' previous motion for summary judgment on the issue of waiver, would leave only Defendants' affirmative defense of abandonment at issue.

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RESPECTFULLY SUBMITTED this 1st day of December, 2004.

FAVOUR MOORE & WILHELMSEN, P.A.

By _____
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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs are all owners of real property located in Coyote Springs Ranch, Yavapai County, Arizona. *Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment (hereinafter "SSOF") at ¶¶1-3.* Coyote Springs Ranch is subject to recorded Declaration of Restrictions. The Declaration of Restrictions, provides in relevant part:

> 2. No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof.
>
> * * *
>
> 7. (e) No structure whatsoever other than one single family dwelling or mobile home, as herein provided, together with a private garage for not more than three (3) cars, a guest house, service quarters and necessary out buildings shall be erected, placed or permitted to remain on any portion of said property.
>
> * * *
>
> 15. No outside toilet or other sanitary conveniences or facilities shall be erected or maintained on the premises.
>
> * * *
>
> 17. The foregoing restrictions and covenants run with the land and shall be binding upon all parties and all persons claiming through them until June 1, 1994, at which time said covenants and restrictions shall be automatically extended for successive periods of ten (10) years, or so long thereafter as may be now or hereafter permitted by law.
>
> * * *
>
> 19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him

> from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitation, covenants and conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. The violation of these restrictive covenants, condition or stipulations or any or more of them shall not affect the lien of any mortgage now of record, or which hereafter may be placed of record, upon said premises or any part thereof.

SSOF at ¶¶4-6; and, SSOF Exhibit 1.

In April, 1998, Defendants Catherine and Donald Cox, purchased real property located in Coyote Springs Ranch. *SSOF at ¶7.* Thereafter, in August 2000, Defendants Catherine and Donald Cox commenced development and improvement of their real property in Coyote Springs Ranch. *SSOF at ¶9.* Since approximately August 2001, Defendants Cox's improvements and development of the subject land included drilling a well, obtaining electricity, construction of a driveway, placement of a mobile home and motor home, erection of a perimeter fence, grading of the property, and installation of underground irrigation lines that cover nine (9) acres of their land. *SSOF at ¶10.*

Since January 2002, Defendants Cox utilize their Coyote Springs Ranch real property for the production of trees, shrubs, and the like for their nursery business. *SSOF at ¶¶12 and 13.* Since that time, Defendants Cox have had at least 6, and as many as 10, employees who have worked at the subject property. *SSOF at ¶14; and, SSOF Exhibits 10, 11 and 12.*

On May 15, 2003, Plaintiffs filed their complaint and request for injunctive relief against Defendants on the grounds that Defendants' nursery enterprise located in the subdivision, violated the recorded Declaration of Restrictions prohibiting business or commercial activity. *SSOF at ¶17.*

Defendants filed their verified answer to the amended complaint on May 21, 2004, specifically raising the affirmative defenses of abandonment, laches, waiver, estoppel and unclean hands. *SSOF at ¶18.* Defendants additionally claimed as an affirmative defense that the complaint was "barred because of Plaintiffs' own negligence, acts, omissions, carelessness and/or inattention."[1] *SSOF at ¶18.*

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[1]Enforcement of restrictive covenants is clearly an action in contract, not tort. Defendants' recognize as much considering their request for attorney's fees under A.R.S. §12-341.01(A). Therefore, Defendants' cannot legally assert a contributory negligence defense in a contract action.

Defendants further requested an award of their attorney's fees and costs under A.R.S. §12-341.01. *Id.*

As described in greater detail below, by Defendants' own testimony, prior and recent admissions, Defendants utilize the property primarily for business or commercial purposes, and only incidentally for residential purposes. This is in violation of the recorded Declaration of Restrictions. Defendants have also admitted to violating the covenant prohibiting more than one family residence or motor home on the property, and maintaining an outdoor portable sanitary facility on the property for their employees' use. Each of these is in violation of the recorded covenants.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990); *Giovanelli v. First Federal Sav. & Loan Ass'n of Phoenix*, 120 Ariz. 577, 587 P.2d 763 (App.1978); *Dutch Inns of America, Inc. v. Horizon Corp.*, 18 Ariz.App. 116, 500 P.2d 901 (1972). A motion for summary judgment is appropriate and "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School, supra,* at p.1008 ("[M]ere existence of a scintilla of evidence is insufficient.")

In this case, there is no genuine issue of fact that Coyote Springs Ranch is subject to recorded Declaration of Restrictions that prohibits business, commercial or industrial enterprises, and that Defendants are in violation of the covenant. Additionally, by their own admission, Defendants are in violation of the covenant precluding more than one residence or mobile home on a property, and from maintaining outdoor sanitary facilities on a property.

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III. THE PROVISION PROHIBITING TRADE, BUSINESS, INDUSTRIAL OR COMMERCIAL USE OF PROPERTY SUBJECT TO THE RECORDED DECLARATION OF RESTRICTIONS IS UNAMBIGUOUS AND ENFORCEABLE AS A MATTER OF LAW

It is well-established law in Arizona that covenants, conditions and restrictions "constitute a contract between the subdivision's property owners as a whole and individual lot owners." *Ahwatukee Custom Estates Mgmt. Assoc., Inc. v. Turner, 196 Ariz. 631, 634, 2 P.3d 1276, 1279 (App. Div. 1 2000) citing Arizona Biltmore Estates Ass'n v. Tezak, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1983).* Thus, "contract interpretation presents questions of law...." *Ibid.* Furthermore,

> Words in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning. *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., 124 Ariz. 413, 416, 604 P.2d 1128, 1127 (1979).* **Unambiguous restrictive covenants are generally enforced according to their terms.** *Id. at 417, 604 P.2d at 1128.*

Burke v. Voicestream Wireless Corp., 422 Ariz. Adv. Rep. 16, 87 P.3d 81, 83 (App. Div.1 2004), (citations in original; emphasis added); Country Club District Homes Assoc. v. Country Club Christian Church, 118 S.W.3d 185, 189 (Mo.App. 2003) ("[R]estrictive covenants, like any other covenant or contractual provision[], will be enforced where 'the intention is clear.'")

A.R.S. §33-416 expressly provides:

> The record of a grant, deed or instrument in writing authorized or required to be recorded, which has been duly acknowledged and recorded in the property county, shall be notice to all persons of the existence of such, grant, deed or instrument....

Id. The Supreme Court has held Arizona's constructive notice statute binds subsequent purchasers of recorded restrictions:

> The function of our recording statutes is to protect persons who deal with interests in land by giving notice. This protects against claims or obligations by subsequent purchasers without notice. Under the rules of constructive notice, a successor in interest is charged with notice of any equitable covenant that is properly recorded in a prior instrument and for which the successor is required to search. ***The successor takes the property bound by the covenant and must comply with it.***

Federoff v. Pioneer Title & Trust Co. of Arizona, 166 Ariz. 383, 387, 803 P.2d 104, 108 (1990)

(internal citations omitted; emphasis added). Thus, notwithstanding any claim to the contrary by Defendants that they may have lacked actual knowledge of the recorded covenants, they are legally charged with constructive notice of the Declaration of Restrictions, and are must comply with the restrictions.

Similar to the judicial review of a contract, the interpretation of a restrictive covenant is a question of law. "[C]ontract interpretation presents questions of law...." *Ahwatukee Custom Estates Mgmt. Assoc., Inc., supra, 196 Ariz. at 634, 2 P.3d at 1279 (citing Arizona Biltmore Estates Ass'n v. Tezak, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1983)).* Furthermore,

> Words in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning. *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., 124 Ariz. 413, 416, 604 P.2d 1128, 1127 (1979).* Unambiguous restrictive covenants are generally enforced according to their terms. *Id. at 417, 604 P.2d at 1128.*

Burke, supra, 87 P.3d at 83, (citations in original); R&R Realty Co. v. Weinstein, 4 Ariz.App. 517, 527, 422 P.2d 148, 158 at fn. 4 (1966) ("the rule regarding strict construction of a covenant cannot be applied to defeat the obvious purpose of the restriction, or the obvious intention of the parties, even though not precisely expressed...." quoting 26 C.J.S. Deeds §163, pp.1098-1102 (1956)). The Missouri appellate court has held that it is a question of law as to intent underlying recorded restrictions:

> This court determines the intention of the parties "from the language used, and in the light of the entire context of the instrument containing the restrictions." "The intent must be gathered, not from one clause but from the four corners of the instrument." **"Where the language of a restriction as to the use of property is clear and unambiguous, its meaning must be given effect, and it is neither necessary nor proper to inquire into the surrounding circumstances for aid in its construction."**

Country Club, supra, 118 S.W.3d at 189 (quotations in original, citations omitted; emphasis added). In this case, the plain and unambiguous language of the recorded Declaration of Restrictions provides that: "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof." This language of the restrictive covenant is clear and unambiguous. Defendants have never claimed that the language of the

restrictive covenants at issue in this case is anything other than clear and unambiguous. Defendants cannot now manufacture an ambiguity in an effort to avoid summary judgment based on their own prior admissions and testimony.

The affidavit of the original grantor, Robert D. Conlin, who was responsible for the "preparation and recording of the Declaration of Restrictions" at issue in this case, has stated under oath that the recorded restrictions were intended to ensure a rural, residential community:

> 3. The recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch subdivision would be a residential community. The nine-acre lots were intended to ensure that the residential community would retain a rural setting.
>
> 4. To protect the rural, residential setting of the subdivision, a covenant was included strictly prohibiting trade, business, commercial or industrial enterprises [from] operating in the Coyote Springs Ranch subdivision.
>
> 5. The covenant against trade, business, commercial or industrial enterprises was not intended to prohibit against landowners or occupiers from maintaining a home-office in their residence, from parking or maintaining their business vehicles or equipment on their property, or from indicating to the public that they had a home office at their residence.

SSOF at ¶20; and, SSOF Exhibit 6.

However, in order to avoid enforcement of the covenant, Defendants have taken the position that they are not engaged in a "business" operation but are rather using the land for "agricultural purposes," namely, a "tree farm." Conlin has also personally viewed Defendants property and the nursery operation they are conducting on the land. He has verified in his affidavit that:

> 6. ...As an original grantor and creator of the recorded Declarations of Restrictions, [dated] June 13, 1974, **it was my intention that the restrictions prohibit the very activity being conducted on the property by Catherine and Donald Cox. Furthermore, the express language of the restrictions provide such.**

SSOF at ¶20; and, SSOF Exhibit 6 (emphasis added). "In determining intent [of a restrictive covenant], language in the covenant is to be given its 'ordinary and common use.'" *Mains Farm Homeowners Assoc. v. Worthington, 121 Wn.2d 810, 815, 854 P.2d 1072, 1074 (1992) (internal citation omitted).*

The legal issue before the Court turns on what is meant by "trade, business, profession or any

other type of commercial or industrial activity" as used in the restrictive covenant. Webster's defines "business, commerce, trade, [and] industry," to mean:

> ...activity concerned with the supplying and distribution of commodities. Business may be an inclusive term but specifically designates the activities of those engaged in the purchase or sale of commodities or in related financial transactions; Commerce and Trade imply the exchange and transportation of commodities; Industry applies to the producing of commodities, esp. by manufacturing or processing, usu. on a large scale....

Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc., 1986 at "business," p.190 (*capitalization omitted*)[2]. The restrictive covenant is against *purpose or use* of the land; not the *name* Defendants ascribe to their operation. In this case, Defendants' *purpose* in operating what they characterize as their "agricultural, tree farm" is to raise commodities for later sale at their retail and wholesale nursery. *SSOF at ¶¶12, 13, 14 and 16; and, SSOF Exhibits 2, 5, 9, 10, 11, and 12.* Restrictive covenants though "narrowly construed...should never be construed in a manner that would defeat the plain and obvious purpose and intent of the restriction." *Robins v. Walter, 670 So.2d 971, 973 (Fla.App. 1995) (bed and breakfast held a business or commercial use of property in violation of restrictive covenant relying on Webster's New World Dictionary definition for "inn").*

Prior to purchase of the subject property, while viewing potential properties with a local real estate agent, Defendant Donald Cox testified that he informed the agent that the purpose for the property was "to grow plants and trees." *SSOF at ¶8 (Deposition of Donald Cox, at p.17, line 25 through p.18, line 3).* Defendant Catherine Cox testified during her deposition that the Coyote Springs Ranch property was used as a growing yard for excess inventory for their business operations: a retail nursery located on Highway 69, and operated under the name "Prescott Valley Nursery"; as well as "Prescott Valley Growers," a wholesale operation located on Viewpoint Drive. *SSOF at ¶12*

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[2]Arizona appellate courts often define words appearing in a statute, that are not otherwise defined in the statute, by referring to the plain or common meaning of the word as provided in a dictionary. *See e.g., State v. Ehrlich (In re Leon G.), 204 Ariz. 15, 59 P.3d 779 (2002) (referring to dictionary for meanings of "likely" and "make" as these terms appeared undefined in a criminal statute).*

(Deposition of Catherine Cox, at p.15). Defendant Catherine Cox specifically denied that the Coyote Springs Ranch property was used as a nursery, testifying instead that it was used as a growing yard for excess inventory:

> Q. The Coyote Springs property is used as a nursery; correct?
>
> A. No. It is not.
>
> Q. What is it used for, ma'am?
>
> A. **It is a growing yard for our excess inventory.**

Id. (Deposition of Catherine Cox at p.15, line22 through p.16, line 1 (emphasis added)). When asked what she meant by "excess inventory," Defendant Catherine Cox replied: "Excess meaning property that we don't have room for on the other two properties." *Id. (Deposition of Catherine Cox at p.17, line 23 through p.18, line 4).* As for what the "excess inventory" consists of, Defendant Catherine Cox testified:

> A. At the present time, it is fifteen-gallon-size trees and twenty-four inch box trees and thirty-six inch box trees.
>
> Q. Anything else?
>
> A. No.
>
> Q. And you said that is presently what is on the property?
>
> A. Yes.
>
> Q. In prior years, what else has been on the property?
>
> A. The same thing.

Id. (Deposition of Catherine Cox at p.18, lines 7-17; and, SSOF Exhibit 9). Defendant Catherine Cox further testified that the inventory present at the Coyote Springs property is in pre-market condition, with the intent that the inventory be moved to their retail or wholesale facilities for distribution into the market. *Id. (Deposition of Catherine Cox at pp.25-28).*

She further testified that the excess inventory is shipped, by trucks owned by the business, and is ultimately moved to either the resale or wholesale location for sale.

Q. The excess inventory that you have at the Coyote Springs property, does that go to either your retail location or your wholesale location?

A. Yes, it does.

Q. How does – That excess inventory, how does that arrive at the Coyote Springs property?

A. Comes by truck, our trucks.

* * *

Q. The trees, plants and shrubs that you have at the Coyote Springs property, where do they go next?

A. When they are ready, they can go either to the retail yard or to the wholesale yard.

Q. How are they transported?

A. By our trucks.

Id. (Deposition of Catherine Cox at p.22, lines 19-25; and, at p.28, lines 11-16, respectively). During her deposition, she admitted that the inventory (trees, shrubs, and the like) present on the Coyote Springs Ranch property was grown for the purpose of realizing a profit:

Q. And that is part of your business then, those trees?

[Defendants' counsel]: Objection.

Q. You called it inventory; correct?

A. That's correct.

Q. Any you grew them for a profit; correct?

A. That's true.

Id. at p.80, lines 16-23.

Other indicia that Defendants' use of the Coyote Springs Ranch property is for business, commerce, trade or industry is how Defendants' hold title to the "excess inventory" on the land – in partnership with their two sons.

Q. ...You testif[ied] that you have a partnership; you, your husband and you two sons? Correct?

A. Yes.

Q. And that partnership is a forty-five, forty-five, ten split; correct?

A. Yes.

Q. Now the partnership concerns what business?

A. It concerns all of the properties.

Q. Okay. And when you say all of the properties, what specifically are you referring to?

A. The three properties that we discussed.

* * *

Q. The three properties you say are part of the assets of the partnership are the Coyote Springs property; correct?

A. Yes.

Q. The property on Highway 69; correct?

A. Yes.

Q. And the property on Viewpoint Drive?

A. Yes, it does.

SSOF at ¶12 (Deposition of Catherine Cox, at p.16, line 10 through p.17, line 12). When asked what the assets of the partnership were, Defendant Catherine Cox responded "the inventory." *SSOF at ¶13 (Deposition of Catherine Cox, at p.70, lines 11-13).* The excess inventory maintained by Defendants on the Coyote Springs Ranch property requires the services of employees:

Q. Of the approximate thirty employees that you have, how many are at the retail location?

A. About eight.

Q. How many are at the Viewpoint Drive location?

A. About nineteen.

Q. And the rest are at the Coyote Springs location?

A. Yes.

SSOF at ¶14 (Deposition of Catherine Cox at p.14, line 23 through p.15 at line 4); and, SSOF Exhibits 10, 11 and 12. Asked what structures were on the property, Defendant Catherine Cox testified:

A. I have a mobile home on the property – excuse me. My motor home is on that property and my son Alan has his motor home there for a short time. That is all the structures that are on there other than the water tank.

Q. Is the water tank above ground?

A. Yes, it is.

* * *

Q. Are there any facilities that your employees use for bathroom breaks?

A. There is a J-John on the property.

Q. Okay. Anything else that they have access to, where they can eat their lunch or take a break?

A. There is a shed.

Q. Is that where they eat lunch?

A. They eat in their cars.

SSOF at ¶15 (Deposition of Catherine Cox at p.85, lines 3-21; see, Response to Request for Production at No. 10, billing statements for portable outdoor sanitation facility (attached at SSOF, Exhibit 13).

The test for determining whether a landowner's use of property violates a restrictive covenant precluding business or commercial activity is whether the business or commercial use is incident to the residential use of the property. *Stewart v. Jackson, 635 N.E.2d 186 (Ind.App. 1994); 9394 LLC v. Farris, 782 N.Y.S.2d 281 (N.Y.App. 2004).* In determining whether a commercial use of property violates a residential-only use covenant, "[t]he crucial factor is the activity involved and its comparison to the ordinary and common meaning of use for residential purposes." *Stewart, supra, 635 N.E.2d at 191 (relying on Beverly Island, supra).* The Indiana appellate court, based upon a review of cases by its courts and those of other jurisdictions, distilled the following factors for determining whether an owner's use of land violated a covenant prohibiting commercial or business uses. *Id., 635 N.E.2d at 192.* First, whether the use is incidental to the residential use. *Ibid.* Secondly, whether the use is "small and not significantly more intrusive than normal single-family activity"; and, finally whether the "activity [is] customarily incident to the residential use of property." *Ibid.* Furthermore,

it is important to note that a restrictive covenant that allows residential uses "permits a wider variety of uses than a restriction prohibiting commercial or business uses." *Beverly Island Assoc. v. Zinger, 113 Mich.App. 322, 326, 317 N.W.2d 611, 613 (1982).*

Contrary to Defendants' position that they are not in violation of the restrictive covenant because no business is transacted on the premises, *see SSOF Exhibit 2 (Deposition of Catherine Cox at p.20, lines 14-17 ("no sales and no transactions" at Coyote Springs Ranch property))*, profit or remuneration is not considered a critical factor in the analysis.

> Residential use is distinguishable from commercial or business use. The language of the restriction is concerned with the physical activity carried on upon the premises, and not with the presence or absence of a profit-making motive on the part of the landowner.

Stewart, supra, 635 N.E.2d at 192 (quoting Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459, 469 (Ind.App. 1987) (dissenting opinion)); Beverly Island, supra, 113 Mich.App. at 326-27, 317 N.W.2d at 613 (compensation is not pivotal question in determining whether landowner's activities violate residential-only use covenant).

In this case, Defendant Donald Cox admitted that prior to the purchase of the subject property, when he met with the real estate agent, Juanita Offerman, that he "told her what we had in mind, that we wanted to grow plants and trees." *SSOF at ¶8 (Deposition of Donald Cox, at p.17, line 25 through p.18 at line3).* His wife admitted that the property is used for "excess inventory" for placement at either their retail or wholesale nurseries located locally. *SSOF at ¶¶12 and 13 (Deposition of Catherine Cox, at p.22, lines 19-22).* In obtaining an agricultural use exemption from Yavapai County in July 2002, Defendant Catherine Cox signed an affidavit under oath verifying that: "Any residential use of this property is secondary and must be an accessory use to the principal agricultural use as stated []. Should the property be used for any use not customarily incidental to the agricultural use, the exemption clause shall no longer apply." *SSOF at ¶16; and, SSOF Exhibit 5.* In response to an inquiry as to the farm property use, Defendant Catherine Cox in that same affidavit verified that the "Farm property shall be used for **production** of...: Shade Trees - Ornamental &

Native[;] Fruit Trees[;] Ornamental & Native Shrubs[;] Flowers and vegetables[;] Evergreens (Native)[;] Native Perennials." *Ibid.* The plot plan sketch attached to the affidavit provides a detailed sketch that as early as July 2002 Defendants intended to utilize 19 of the 20 Coyote Springs Ranch acres for the purpose of growing trees; only one acre was set-off as a "Homesite" for placement of a mobile home. *SSOF Exhibit 5.*

That same month – July 2002 – Defendant Catherine Cox admitted to writing a letter to Yavapai County Planning and Zoning Commission. *SSOF at ¶16 (Deposition of Catherine Cox, at p.110, line 9 through p.111, line 1).* In that letter, she stated:

> Prescott Valley Growers began operations at [] Viewpoint Drive in July 1991....In the last few years ***we have not been able to keep up with the demands*** in this area.
>
> ***The property at 7325 North Coyote Springs Road was chosen as an expansion site*** due to its close proximity and the fact that other agricultural businesses were already operating in the area.
>
> ***We wish to use this property for the production of the following*** items: annuals, perennials, vegetables, fruit trees, shade trees and ornamental and native shrubs and trees.
>
> * * *
>
> ***Plants will be distributed to the wholesale trade only....***

Id. (Deposition of Catherine Cox, at deposition transcript Exhibit 5 (emphasis added)).

Defendant Catherine Cox further testified that between April 1998 when she and her husband purchased the property, until August 2000, they made no improvements or changes to the land. *SSOF at ¶10 (Deposition of Catherine Cox, at p. 49, line 25 through p.50, line3).* Thereafter, Defendants made considerable improvements to the property in order to grow their "excess inventory." *Id.; SSOF Exhibits 7 and 8.* For instance, Defendants spent almost $32,000.00 on a drip irrigation system. Contrary to her deposition testimony that only 3 employees work at the Coyote Springs Ranch property, documents produced pursuant to a discovery request reveal that since 2002 Defendants have had at least 6, and up to 10, employees working at the subject property. *SSOF at ¶14; and, SSOF Exhibits 10, 11 and 12.* An analysis of the employment records produced by Defendants reveal the following:

I. January through December 2002

Total Employees – 6

Category of Employee[3]: (a) Plant Store Operator (1)

(b) Landscape Gardener (3)

(c) Hourly (2)

Total Hours Worked and Paid – 5,765

Category of Employee: (a) Plant Store Operator – 1,840 hours

(b) Landscape Gardeners – 2,824 hours

(c) Hourly – 1,101

II. January through December 2003

Total Employees – 10

Category of Employee: (a) Plant Store Operator (1)

(b) Landscape Gardener (4)

(c) Hourly (5)

Total Hours Worked and Paid – 6,215

Category of Employee: (a) Plant Store Operator – 1,992 hours

(b) Landscape Gardeners – 2,684 hours

(c) Hourly – 1,539

III. January through July 2004

Total Employees – 6

Category of Employee: (a) Plant Store Operator (1)

(b) Landscape Gardener (1)

(c) Hourly (4)

Total Hours Worked and Paid – 3,832.50

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[3]Employee titles and/or category as provided in Defendants' payroll records.

Category of Employee: (a) Plant Store Operator – 1,288 hours

(b) Landscape Gardeners – 1,270.5 hours

(c) Hourly – 1,274

SSOF Exhibits 10, 11 and 12.

Defendant Donald Cox admitted that at the time he and his wife were looking at properties in the area, he expressed to their real estate agent that the property was to be used for growing, or producing, trees and shrubs. *SSOF at ¶8.* Defendant Catherine Cox, in her sworn affidavit to Yavapai County Planning and Zoning Commission, verified under oath that their property in Coyote Springs Ranch was to be used for the "production" of a variety of trees, shrubs, perennials, flowers and vegetables. *SSOF at ¶16; and, SSOF Exhibit 5.* Further, in that same affidavit, Catherine Cox swore that the residential use of the property was ***secondary*** and ***an accessory use to the principal agricultural use*** of the land. *Ibid.* Since 2002, Defendants have consistently employed at least 6 individuals to work on the property. *SSOF Exhibits 10, 11 and 12.* One of those individuals is categorized by Defendants in their payroll records as a "Plant Store Operator." *Ibid.* And, at least since August 2003, has provided those employees with an outdoor sanitary facility. *SSOF at ¶15; and SSOF Exhibit 13.* Although Defendants each testified that they were not conducting a "business" in violation of the recorded covenant because no sales transactions are conducted on the property, Defendant Catherine Cox nevertheless admitted that the purpose of growing the trees on the Coyote Springs Ranch property was for ultimate re-sale or distribution to their retail and wholesale business locations. *SSOF at ¶¶12 and 13.* Consequently, she admitted that the trees were grown on the subject property ultimately for profit. *SSOF at ¶12.*

The restrictive covenant at issue in this case clearly provides: "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof." As a matter of law, this provision is unambiguous. According the terms their plain meaning, the covenant strictly prohibits the very activity that Defendants are principally devoting the subject property to. While Defendants dispute that the growing of "excess

inventory" on their property is not a business because no sale transactions are conducted on the property, the statutory definition of "nursery" is particularly persuasive:

> "Nursery" means real property or other premises on or in which nursery stock is propagated, grown or cultivated or from which source nursery stock is offered for distribution or sale.
>
> "Nursery stock" includes all trees, shrubs...herbaceous plants whether annuals, biennials or perennials...decorative plant material, flowers...cuttings, buds, grafts, scions and other plants ***intended for sale***, gift or propagation....

A.R.S. §3-201 at (5, 6) (emphasis added). Hence, even though Defendants may not conduct sales transactions at their Coyote Springs Ranch property, for purposes of the statute, Defendants are engaging in a nursery operation.

By Defendants' own admission, regardless of how they characterize it, their use of the property is not primarily as a residence, and their business use of the property is not incident to a residential use. The improvements made to the property, the admitted use of the property as a growing yard for trees, shrubs and the like, for distribution to the wholesaler or consumer at their re-sale locations, the employment of individuals to work at the property for the purpose of maintaining their "excess inventory," the characterization of the inventory as a partnership asset, the intended re-sale of the products, the purpose of growing the trees and shrubs for eventual profit, and their prior sworn statements that the residential use is <u>not</u> the primary use of the property, demonstrate that as a matter of law, there is no genuine issue of material fact that Defendants are in violation of the restrictive covenant prohibiting the use of property in the sub-division for business, commercial, trade or "any other type of commercial or industrial activity."

IV. DEFENDANTS HAVE FAILED TO RAISE ANY FACT IN SUPPORT OF THEIR AFFIRMATIVE DEFENSES OF ESTOPPEL, LACHES AND UNCLEAN HANDS

<u>A. AS A MATTER OF LAW, DEFENDANTS CANNOT ESTABLISH ESTOPPEL</u>

Defendants have raised the affirmative, equitable defenses of estoppel, laches, waiver, and

unclean hands.[4] The Supreme Court of Arizona has set forth the elements of estoppel as:

> A claim for estoppel arises when one by his acts, representations or admissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice.

St. Joseph's Hospital and Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 317, 742 P.2d 808, 818 (1987) (internal citations omitted). Implicit in the affirmative defense of estoppel is that the induced party establish reasonable reliance on the act, representation or admission that the other party is estopped to deny.

> Several elements must be present before the courts will invoke an equitable estoppel. In 19 Am.Jur., Estoppel, §34 equitable estoppel or estoppel in pais is defined as the principle of law "by which a party who knows or should know the truth is absolutely precluded, both in law and in equity, from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, ***he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated***, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed."

Ellison v. Butler, 271 Ala. 399, 401-2, 124 So.2d 88, 90 (1960) (quotation in original; internal citations omitted; emphasis added). "The essential elements of estoppel are that the plaintiff, with knowledge of the facts, must have asserted a particular right inconsistent with that asserted in the instant action, *to the prejudice of another who has relied upon his first conduct.* If any of the essential elements are lacking, there is no estoppel." *Weiner v. Romley, 94 Ariz. 40, 43, 381 P.2d 581, 583 (1963) (italics in original; internal citations omitted).*

In this case, Defendant Donald Cox admitted that prior to purchase of the subject property, he informed their real estate agent of the intended use of the property. *SSOF at ¶8.* Although Defendants

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[4]Plaintiffs have previously moved for summary judgment on the defense of waiver, based upon the Arizona appellate court's decision in *Burke.*

Defendants have also raised the affirmative defense that the restrictive covenants have been abandoned. That defense is not a topic in this motion for summary judgment.

may have *thought* the restrictive covenants were not enforced or had been abandoned, as Defendant Donald Cox claimed, they have failed to establish that any *act or representation* by any of the Plaintiffs led them to this conclusion.

At most, Defendants apparently are claiming that Plaintiffs failure to enforce the restrictive covenants at any other time led them to believe the recorded Declaration of Restrictions was unenforceable. However, Defendants have failed to point to any fact that they relied on what Plaintiffs, or any of them, did or did not do to enforce the restrictive covenants. Moreover, as a matter of law, Defendants cannot establish reasonable reliance since they had constructive knowledge of the recorded Declaration at the time they purchased the property. *A.R.S. §33-416; Federoff, supra, 166 Ariz. at 387, 803 P.2d at 108; see, SSOF at ¶7; and, SSOF Exhibit 4 (Seller's Property Disclosure Statement and Preliminary Title Report).* Defendants thus had notice of the non-waiver provision in the recorded restrictions. The Declaration of Restrictions specifically provides that:

> 19. If there shall be a violation or threatened or attempted violation of any of said covenants, conditions, stipulations or restrictions, it shall be lawful for any person or persons owning said premises or any portion thereof to prosecute proceedings at law or in equity against all persons violating or attempting to, or threatening to violate any such covenants, restrictions, conditions or stipulations, and either prevent them or him from so doing or to recover damages or other dues for such violations. No failure of any other person or party to enforce any of the restrictions, rights, reservations, limitation, covenants and conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof. The violation of these restrictive covenants, condition or stipulations or any or more of them shall not affect the lien of any mortgage now of record, or which hereafter may be placed of record, upon said premises or any part thereof.

More importantly, to hold that Defendants may, as a matter of law, assert the defense of estoppel premised upon their reliance on Plaintiffs' alleged acts or representations in not pursuing other violators, is to eviscerate the legal effect of the non-waiver provision in the Declaration. The Arizona appellate court has held that the failure of a landowner to enforce a restrictive covenant does not preclude later enforcement by the landowner when there is a non-waiver provision. *Burke, supra, 422 Ariz. Adv. Rep. 16, 87 P.3d at 83.* Even assuming for sake of argument only, the existence other business or commercial activities conducted in the subdivision, the non-waiver provision does not

foreclose enforcement of the restriction against Defendants. As the *Burke* court stated, to "hold otherwise would render the non-waiver provision meaningless and violate the expressed intention of the contract among the property owners." *Ibid.*

B. DEFENDANTS CANNOT INVOKE THE EQUITABLE DOCTRINE OF LACHES

Defendants also have raised the affirmative defense of laches, inherently claiming that Plaintiffs allegedly dilatory conduct to enforce the restrictive covenants has resulted in prejudice to them. Although Defendants purchased the property in April 1998, they admitted that they made no improvements of any type to the property until 2000 when they admittedly placed a mobile home on the property. On May 30, 2001, Doug Reynolds, Yavapai County Development Services Department, in response to a complaint received from a neighbor, visited with Defendants at the Coyote Springs Ranch property. *SSOF at ¶11; and, SSOF Exhibit 5.* At that time, Defendants admittedly had made no improvements or alterations to the property – other than placing the mobile home on the site – and received actual notice from Reynolds of the existence of the recorded covenants and restrictions.

Q. Who was it from the planning department that came? Do you recall?

A. It was Doug Reynolds.

* * *

Q. When Mr. Reynolds came to your property, did he tell you why he was there?

A. I believe one of the neighbors had called the planning department.

* * *

A. I don't know why else he would have come [other than in response to a complaint made by an unknown neighbor]. ***We had nothing on the property, nothing.***

Q. You said that he came in 2001?

A. Yes.

Q. And you had at that time or by that time in August 2000, you had moved a mobile home onto the property; correct?

A. That's true.

Q. ***So when you say there was nothing on the property, what do you mean by nothing?***

A. ***Nothing other than our mobile home.***

Q. Okay. ***In other words, no trees, box trees, shrubs, that sort of thing; correct?***

A. ***Right.***

SSOF at ¶11 (Deposition of Catherine Cox, at p.54, lines 7-9, 16-19; p.55, lines 1-14 (emphasis added)). Reynolds informed Defendants of the existence of the recorded restrictions, and based upon Defendant Catherine Cox's testimony, informed her to go speak with a local attorney concerning their plans for the property.

Q. What did Mr. Reynolds say to you?

A. He suggested that we go to see Mr. Launders who owned property in the area, and that was after we talked to him about our plan to grow trees on the property.

Q. ...[W]ho did you speak to about growing trees on the property? ...To whom are you referring, Mr. Reynolds or Mr. Launders?

A. We spoke to Mr. Reynolds. He suggested that we go to see Mr. Launders.

Q. ...Did Mr. Reynolds say anything else to you at that time?

A. He mentioned something about CC&R's.

Q. Do you remember what in particular that he mentioned about that?

A. Just that they were – just that they had CC&R's in that area.

SSOF at ¶11 (Deposition of Catherine Cox, at p.55, line 19 through p.56, line 10). According to Defendant Catherine Cox, it was Launders who allegedly told her and her husband that "growing nursery products" on the land would not be "a problem."

Q. What did you say to Mr. Launders?

A. We talked to him about our plans to grow nursery product on that property in Coyote Springs. He said he would not want a nursery next to him, but he said that if our neighbors didn't mind, he didn't think we would have a problem. Then he mentioned these CC&R's. At some point in the meeting, he looked in his filing cabinet for a copy of them but could not find them....

SSOF at ¶11 (Deposition of Catherine Cox, at p.57, lines 17-24). After placing the mobile home on

the property, and drilling a well, in August 2000, Defendants made no further improvements to the property until May 2001. *SSOF at ¶10; and, SSOF Exhibits 7 and 8 (chronological list of improvements prepared by Defendant Catherine Cox).* Thereafter, in May 2001, Defendants erected a perimeter fence around the property, graded the property in late 2001, and admittedly first began producing trees in January 2002, after receiving an agricultural exemption on January 15, 2001. *Id.* The irrigation lines were placed underground, with "spaghetti" lines protruding from the main line and used for irrigation. *SSOF at ¶10 (Deposition of Catherine Cox, at p.65, lines 13-18).* This litigation was commenced on May 16, 2003.

It is an aged legal maxim of common law that *equitas sequitur legem*, or "equity follows the law." *Jarvis v. State Land Dep't, 106 Ariz. 506, 510, 479 P.2d 169, 173 (1970); Goodman v. Newzona Inv. Co., 101 Ariz. 470, 473-74, 421 P.2d 318, 321-22 (1966); Freedman v. Continental Serv. Corp., 127 Ariz. 540, 545, 622 P.2d 487, 492 (App. 1980).* In other words, where there is a legal defense, a party cannot avail itself of an equitable defense. *Jarvis, supra.* In this case, Plaintiffs filed suit within 18 months of Defendants' admitted first production of trees on the property. The statute of limitations provides that claims to enforce such rights must be brought within 4 years. *A.R.S. §12-550; Hall v. Romero, 141 Ariz. 120, 685 P.2d 757 (App. 1984) (where there is doubt, the longer limitations period applies).* Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct. Laches will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns, 199 Ariz. 81, 83, 13 P.3d 1198, 1200 (2000) (internal citations omitted).* Even indulging Defendants with every reasonable inference in accordance with summary judgment principles, Plaintiffs timely filed their action within the statutory limitations period from the time Defendants first placed a mobile home on the property in August 2000.

Again, even assuming that Defendants could avail themselves of the equitable doctrine, they still have failed to establish that Plaintiffs' failure to file suit earlier was a dilatory conduct that operated to their prejudice.

The general rule is that a plaintiff must exercise diligence and avoid unreasonable

> delay in prosecuting an action. The reason for this rule is that unreasonable delay and lack of diligence either evidence an abandonment by the plaintiff of his claim or else prejudice in some way the defense against such claim.

Barr v. Petzhold, 77 Ariz. 399, 406, 273 P.2d 161, 165 (1954) (citing Price v. Sunfield, 57 Ariz. 142, 147-148, 112 P.2d 210, 212 [1941]).

In this case, Defendants cannot validly invoke the equitable doctrine of laches as they did not rely on Plaintiffs' alleged inaction in bringing the instant suit to their detriment. Rather, Defendant Catherine Cox testified that prior to development of their land for the production of trees, they received actual notice of the existence of the recorded restrictions from Reynolds, and thereafter based on Reynolds' suggestion, they contacted Launders. Launders allegedly informed Defendants that their intended use of the property would not violate the recorded covenants. It was on this alleged advice Defendants apparently relied on in proceeding with their development of the land.

Furthermore, "[m]ere passage of time is not prejudice." *Leon v. Byus, 115 Ariz. 451, 453, 565 P.2d 1312, 1314 (App. 1977) (internal citation omitted).* In *Leon*, the Arizona appellate court held that the passage of 20 years before the plaintiffs filed suit in an adverse possession case did not constitute laches. *Id. at 453-4, 565 P.2d at 1314-15.* Viewing the evidence in the light most favorable to Defendants, nothing they did on the land until January 2002 would have led an observer to conclude that they were intending to utilize the land in a manner inconsistent with the covenants and restrictions. Thus, drilling a well and placing a mobile home on the property (in August 2000) would not have revealed Defendants' intended use of the property. Likewise, erecting a perimeter fence (May 2001), and grading the property (September through November 2001), are not acts inconsistent with the recorded Declaration of Restrictions that would have placed Plaintiffs on notice of Defendants intended use of the property to "produce trees." Additionally, the irrigation lines (placed on the property in February 2002) were admittedly placed underground, and hence not visible. And, Plaintiffs were not privy to Defendants obtaining an agricultural use exemption from Yavapai County in January 2001.

Here, Plaintiffs filed suit within 18 months of Defendants admitted first "production of trees"

on the property. Having filed suit within the statutory period of limitations, Defendants are precluded from invoking equity. Alternatively, even assuming for sake of argument that Defendants could invoke the doctrine of laches, as a matter of law, Plaintiffs conduct in filing suit within the statutory limitations period cannot operate as dilatory conduct. Finally, Defendants have failed to establish any fact on which their development of the land was a result of Plaintiffs failure to file suit earlier. That Defendants may claim that they are prejudiced in having invested money in the development of the land for the "production of trees," was an argument summarily rejected by the Arizona Supreme Court in *Condos v. Home Development Co.*:

> Defendants further claim that it would work a hardship upon them to deprive them of their business after having made large investments. The answer to this is that they procured the license and entered into the business with knowledge of the existence of the restrictive covenant and therefore cannot complain of any losses or hardships which may result from their breach of said covenant.

Id., 77 Ariz. 129, 136, 267 P.2d 1069, 1073 (1954).

C. DEFENDANTS ARE PRECLUDED AS A MATTER OF LAW FROM RAISING THE AFFIRMATIVE EQUITABLE DEFENSE OF "UNCLEAN HANDS"

To invoke the doctrine of unclean hands as a bar to a claim, the party must establish that "the act of unconscionable conduct on the part of plaintiff relate to the very activity that is the basis of his claim." *Barr, supra, 77 Ariz. at 407-8, 273 P.2d at 166; see also, Condos, supra.* Plaintiffs contend that Defendants have violated the restrictive covenants prohibiting business enterprises; more than one mobile home; and, outdoor sanitary facilities. *SSOF at ¶6; and, SSOF Exhibit 1 (Recorded Declaration of Restrictions, June 13, 1974 at ¶¶2, 7(e) and 15, respectively).* Defendants have admitted to violating the restriction prohibiting outdoor sanitary facilities. *SSOF at ¶15 (Deposition of Catherine Cox, at p.85, lines 14-16); and, SSOF Exhibit 13.* Defendant Catherine Cox further admitted during her deposition that their son has a motor home on the premises:

> A. I have a mobile home on the property – excuse me. My motor home is on that property and my son Alan has his motor home there for a short time. That is all the structures that are on there other than the water tank.

SSOF at ¶15 (Deposition of Catherine Cox, at p.85, lines 3-7).

In order to invoke the equitable doctrine of unclean hands, it is incumbent upon Defendants to establish that Plaintiffs are in violation of these covenants. Defendants may argue that Plaintiffs may be in violation of the restriction regarding the visibility of above-ground water tanks. *SSOF Exhibit 3 (Declaration of Restrictions at ¶16).* However, Plaintiffs have not raised this claim against Defendants. *Plaintiffs' First Amended Complaint, March 18, 2004.* Defendants have been unable to establish that any Plaintiff has an outdoor sanitary facility on their property, operate a business or commercial enterprise, or maintain more than one family dwelling structure on their respective property in violation of the recorded covenants. Therefore, as a matter of law, Defendants cannot raise the defense of unclean hands. "Courts will refuse to enjoin the violation of a restriction, which the plaintiff has previously violated, by invoking the equitable doctrine of 'unclean hands....'" *Atwood v. Walter, 47 Mass.App.Ct. 508, 516, 714 N.E.2d 365, 371 (1999) (citing 9 Powell, Real Property §60.09, at 60-130; §60.10[1], at 60-136 (1999)); (plaintiff in violation of restrictive covenant regarding roof materials barred by doctrine of unclean hands in suing defendant for same violation).*

IV. CONCLUSION

Covenants and restrictions regarding the use of land constitute a contract between homeowners and where properly recorded, are binding against subsequent purchaser. Interpretation of restrictions and covenants is purely a question of law for the court. Unambiguous language in a covenant is accorded its plain meaning under contract principles.

There is no genuine issue of material fact that the recorded Declaration of Restrictions in this case precludes "trade, business, profession or any other type of commercial or industrial activity" from be "initiated or maintained" on any property "or any portion thereof." Additionally, the recorded Declaration of Restrictions precludes outdoor sanitary facilities from being "erected or maintained on the premises" and from any property from having more than one "single family dwelling or mobile home..." In this case, as a matter of law none of these covenants is ambiguous. Defendant Catherine Cox has testified that she and her husband maintain an outdoor sanitary facility on the land they own in the Coyote Springs Ranch sub-division for the use and benefit of their employees who work on the

property. Furthermore, she also admitted during her testimony that she and her husband have a mobile home on the lot, as well as allow their son to maintain a motor home on the property.

More importantly, viewing all evidence in the light most favorable to Defendants, there remains no genuine issue of material fact that Defendants' use of their property is in violation of the recorded Declaration of Restrictions prohibiting business or commercial enterprises. Ascribing the ordinary, plain meaning to paragraph 2 of the recorded covenants demonstrates that the provision was intended to prohibit the use of the land for any operation related to the supplying and distribution of commodities. Regardless of what label Defendants ascribe to their use of the land, their testimony unequivocally establishes that they use the land for the production of trees and for excess inventory, which products are later moved to their local retail or wholesale locations for distribution in the stream of commerce. Defendant Catherine Cox testified that she and her husband are engaged in a partnership with their two sons, and this partnership includes both the retail and wholesale business locations, as well as all "inventory." She further testified that the trees and shrubs grown on the Coyote Springs Ranch property is grown for the purposes of ultimately reaping a profit. The trees and shrubs, or "excess inventory," is maintained by several employees – Defendants' own records establishing at least 6 and as many as 10 employees over the past 3 years being employed at the Coyote Springs Ranch location. There is no genuine issue of material fact that as a matter of law Defendants' use of their land is primarily for their nursery business; and any residential use is merely secondary or incidental. Indeed, Defendant Catherine Cox's affidavit filed with local government officials verifies that their residential use of the property is strictly secondary and accessory to the principal agricultural use of growing trees, shrubs, flowers, and the like (statutorily defined as "nursery stock"), which are subsequently placed into their nurseries.

Moreover, Defendants were charged with constructive notice of the recorded Declaration of Restrictions. Again, viewing the evidence in the light most favorable to them, even if they did not review the documents they received in connection with the purchase of the property that referred to recorded covenants and restrictions, by her own admission Defendant Catherine Cox testified that

Doug Reynolds brought to her and her husband's attention that the property was subject to CC&R's. By admission, Defendants thus had actual knowledge of the existence of the recorded restrictive covenants *prior to* developing their land for use of the production of trees or for maintaining excess inventory. As the original grantor Robert Conlin has stated in his affidavit, Defendants use of their land is in violation of the restrictive covenant prohibiting business or commercial use, and that it was his intent to preclude precisely Defendants use of the land when drafting the Declaration of Restrictions.

Finally, as a matter of law, Defendants cannot assert the equitable defenses of estoppel, laches or unclean hands to bar Plaintiffs' causes of action. First, Defendants cannot cogently assert that they relied on Plaintiffs' conduct as Plaintiffs made no statement on which Defendants could reasonably rely and thereby materially changed their position. Defendants cannot assert that they relied on Plaintiffs' alleged failure to bring suit against any other landowner as Defendants have failed to present any fact that they engaged in a records search. To hold as Defendants argue would undermine the legal purpose of the non-waiver provision. Secondly, equity follows the law, and as a matter of law Defendants cannot complain that Plaintiffs were dilatory in filing suit against them as Plaintiffs filed suit within the statutory period. Equity cannot shorten the statutory limitations period. Additionally, mere passage of time is legally insufficient to invoke the doctrine of laches. Finally, there is no genuine issue of fact that no Plaintiff is allegedly using their property primarily for business, maintains an outdoor sanitary facility or has more than one single family residence or mobile home on their respective property. Hence, as a matter of law, Defendants have no fact on which to raise the affirmative defense of unclean hands.

Therefore, Plaintiffs request that this Court grant summary judgment that Defendants, by their prior sworn admissions, use the property for primarily business purposes, maintain an outdoor sanitary facility, and have more than one residence located on the property, all in violation of the recorded Declaration of Restrictions. Plaintiffs additionally move for summary judgment in their favor on Defendants' affirmative defenses of estoppel, laches and unclean hands.

DATED this 1st day of December, 2004.

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